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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 98.

UNITED STATES OF AMERICA,
PETITIONER,

v.

WILLIAM V. MASSEI,
RESPONDENT.

BRIEF FOR THE RESPONDENT

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No. 98.

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WILLIAM V. MASSEI,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

Opinion Below

The opinion of the Court of Appeals (R. 795-810) is reported at 241 F.2d 895.

Jurisdiction

As recited in the Government brief.

Questions Presented

1) Whether in a tax evasion prosecution based on the net worth method, an increase in net worth plus negation of sources of nontaxable income is sufficient basis for a jury to find that the increase alleged is income.

2) Whether there was any evidence amounting to the "calculated fabrication" as found in *U. S.* v. *Adonis*, 221 F.2d 717.

3) Whether the court below erred in holding that the trial judge should have excluded alleged admissions by respondent and respondent's counsel that he had taken graft in pre-indictment years on the grounds of irrelevance and immateriality.

4) Whether the court below erred in holding that the trial judge should have excluded alleged admissions by respondent and respondent's counsel that he had taken graft in pre-indictment years on the grounds that the admissions were not corroborated.

5) Whether the trial judge should have excluded alleged admissions by respondent's counsel that respondent had taken graft in the pre-indictment years on the grounds that it violated the attorney-client privilege and that counsel was not authorized to make extra-judicial admissions in aid of a criminal prosecution of his client.

6) Whether the court below erred in holding that in a tax evasion prosecution based on the net worth method, proof of a likely source of the respondent's net worth increases is an indispensable element of the Government's burden.

Statute Involved

As recited in the Government brief.

Statement

The statement as it appears on page 2 through 4 in the Government brief is correct. In addition, however, respondent would like to point out the following facts:

1. The only evidence in the case introduced by the Government as to source were the alleged admissions of respondent on one occasion and respondent's counsel on three other occasions. It is clear that without evidence of these alleged admissions, the Government has failed to make out a case.

2. The alleged admissions are inadmissible for the following reasons:

(1) The alleged admissions are irrelevant and immaterial;

(2) The alleged admissions are uncorroborated.

(3) The alleged admissions by respondent's counsel are incompetent as being without authority and in violation of the attorney-client relationship.

The Evidence

Respondent joined the Worcester Police Force as a patrolman in 1923 (R. 200). From April 20, 1932 to March 1, 1933, he was assigned as a plainclothes officer to the vice squad (R. 204, 205). He was again on the vice squad from

January 10, 1938 to September 11, 1939. As a sergeant on January 6, 1940 he was the head of the vice squad which continued until June 1, 1943 (R. 205, 206). Thereafter, until his retirement on December 30, 1951, respondent had no connection with the vice squad. His duties were as personnel officer wherein he inspected the physical plant and saw that the uniformed patrolmen carried out their assignments. He was also assigned to the license board where he investigated licenses for hackneys, gas stations and parking lots. He had nothing to do with taverns, liquor stores or liquor interests (Defendant's Exhibit B, R. 206). Respondent's salary for the years 1946, 1947, 1948, 1949 and 1950 was $2850.00, $3300.00, $3300.00, $4080.00 and $4080.00, respectively (R. 223, 224).

The evidence showed the following increases in respondent's net worth: 1946—$27,265.38; 1947—$9,991.64; 1948—$5533.22; 1949 — $9599.72; and 1950 — $36,033.31 (Government's Exhibit 44, R. 775). On these increases additional taxes were allegedly owing as set forth in Government's Exhibit 45 (R. 777).

Respondent according to the Government had a net worth on December 31, 1945 of $61,080.73. He was given no credit for any cash or currency on hand (Government's Exhibit 44, R. 775).

No tax was paid from 1921 through 1939 (R. 115, 116) but as a municipal employee his salary was exempt, this was in addition to the general $2000.00 exemption in those years (R. 119). Living expenses of respondent in 1946 as fixed by the Government were $1313.40 (Government's Exhibit 44, R. 775).

THE TREASURY INVESTIGATION

On November 7, 1951, the Intelligence Unit of the Treasury opened an investigation of the respondent's tax re-

turns for the years 1945 to 1950, inclusive. Special Agent Hurst, to whom the case was assigned, thereupon notified the respondent, who engaged the services of counsel. Respondent's counsel went to the offices of the Intelligence Unit and, in Hurst's absence, arranged with Hurst's superior, group chief Ierarde, for a conditional payment to the Treasury by the respondent which would deter the Treasury from making a jeopardy assessment against the respondent and would keep the investigation from being publicized. A few days later, the respondent deposited $84,000 in escrow, in the Treasury's so-called suspense account, against whatever liability for taxes might ultimately be assessed against him.

At about the time of said deposit, respondent's counsel delivered a power of attorney to some treasury representative. Hurst noted in his diary that a power of attorney had been filed, but couldn't recall having seen it, the contents of it or whether it was signed by the Respondent (R. 325-6). Counsel testified that it was his custom to file a power of attorney (R. 645) when employed by a taxpayer under investigation, but he had no memory of having done so in this case. No witness had any specific recollection of a power of attorney. Witness Ryan, chief of the Treasury audit division, testified that his division has custody (R. 572) of powers of attorney but that it could not locate any filed on behalf of the respondent.

The provisions of a Treasury Department circular, No. 230 (26 C.F.R., sec. 601.4) which was in effect at the time were admitted in evidence. Excerpts from said regulation are set forth at pages 308-321 and 424-427 of the record. The circular requires that a power of attorney shall be filed in every case, but that it need not be any particular form. There is no official or recommended form, except that it must have been executed before a notary public or witnessed by two disinterested individuals. If

the power of attorney authorizes specific acts, the authority delegated will be considered limited to those acts.

Respondent's counsel undertook to furnish the investigating agent with complete information as to the assets and expenditures of the respondent during the period under investigation. He submitted a series of letters (R. 450-460), (Exhibit 39, R. 340) stating the costs, acquisition dates and sales of assets of the respondent and describing the nature of various payments made by the respondent and his wife. He furnished the agent with a breakdown of the interest and dividend income received by the respondent (Exhibit 43, R. 434). He procured cancelled checks, bank books and photostats of bank records and delivered them to the agent (Exhibit 40, R. 479). He arranged for the examination by Hurst and a Revenue Agent working with Hurst of the contents of safe deposit boxes maintained by the respondent in Worcester and in Westerly, Rhode Island. He sent letters to Hurst answering requests for information made by Hurst during oral discussion of the case. He obtained for Hurst "substantially everything" that Hurst asked for and was "very cooperative" (R. 333, 444, 534). The transmittal of documents between the investigator and the attorney was generally covered by receipts (e.g. Exhibits 40, 41 and 42).

Hurst and respondent's counsel conferred on numerous occasions. From November 16 to 30, inclusive, they met seven times (R. 327-332). They conferred frequently through April, 1952. During the period from November, 1951 to April, 1952, Hurst made diary entries pertaining to the Massei investigation on 50 dates and the majority of these entries referred to information sought from or furnished by counsel. Many diary entries referred to conversations between the investigator and the attorney, in the absence of the respondent. The admissibility of Hurst's

testimony as to these conversations was one of the chief issues at the trial.

Hurst repeatedly asked respondent's counsel to bring the respondent into the Treasury office for a sworn or oral statement and let him look at a list of routine questions, but the attorney refused (R. 335, 567). On January 24, 1952, the agent told the attorney that he thought he would recommend criminal prosecution.

The investigation was completed soon thereafter and the file was forwarded to the office of the District Counsel of the Treasury, where it was assigned to Attorney Isber. His duty was to review the file and pass on the legal sufficiency of the evidence contained therein to sustain a criminal conviction (R. 582). It was the District Counsel's practice to afford taxpayers and their counsel an opportunity to confer with the attorney to whom the case had been assigned (R. 574). Respondent's counsel requested a conference and on May 20, 1952, he appeared before Isber and endeavored to persuade him that the case should not be forwarded to the Justice Department for criminal prosecution (R. 528). Hurst attended this conference. The respondent did not. The conference lasted about an hour. The participants sat around Isber's desk. Respondent's counsel spoke extemporaneously. No procedural formalities were observed. There was no stenographer present. Isber made brief notes (R. 582-3, 394-399). The admissibility of testimony by Isber and Hurst as to statements made by respondent's counsel at this conference was one of the chief issues at the trial.

The file was forwarded to the Justice Department and the respondent was indicted for tax evasion on February 16, 1953. The indictment contained five counts and charged the respondent with having filed fraudulent tax returns for each of the calendar years 1946 to 1950, inclusive.

The jury was empanelled April 2, 1956. On April 3,

1956, after an unrecorded lobby conference (R. 61), the Court noted that some evidential difficulties had arisen and he continued the proceeding until the following morning to permit counsel to research the law. Respondent's request for a continuance of ten days (R. 62, 65) on the ground that the evidence which the Government proposed to offer went beyond the bill of particulars was denied (R. 68). When the proceedings resumed, on April 4th, the respondent filed a motion to suppress (R. 20, 80), which the Court ordered impounded and on which it reserved decision (R. 88). The respondent's request that he be permitted to offer evidence in support of the motion was denied (R. 80, 81). The evidence which the respondent sought to suppress was statements allegedly made by his attorney in his absence during conversations with Treasury officials.

EVIDENCE OF RESPONDENT'S NET WORTH

The first three days of the trial were devoted principally to evidence of the dates of acquisition and costs of assets purchased by the respondent during the prosecution period and the balances in various bank accounts. With minor exceptions this information was originally furnished to Hurst by the respondent's attorney in a series of letters (Exhibits 39, R. 450-460). The respondent's brother Edward testified that the respondent had loaned him $4,500 in 1950; that he and the Respondent each inherited a half-interest in a house when their father died in 1949; that he received nothing else from the father's estate; that he was 20 years younger than his brother, the respondent (R. 250-255). He was not asked the value of the two-family house and it does not appear elsewhere.

The testimony during the first three days formed the basis of Agent Hurst's later computation of the respond-

ent's alleged net worth on the last day of each year from 1945 to 1950, inclusive (R. 497). This computation was written on a blackboard (R. 497-504) which the agent used during his summarizing testimony. The contents of the blackboard appear in Exhibit 44 (R. 775). The respondent's living expenses entered in the computation were also based principally on information furnished by the respondent's attorney (R. 507, 509).

ADMISSIONS AS TO SOURCE.

The balance of the testimony, which lasted for six days, was given by Treasury officials and respondent's attorney. Most of it concerned the Government's contention that the respondent had "admitted through his attorney" (R. 293) that he had taken bribes from 1923 to 1943. This evidence was admitted over the respondent's objections and was relied upon by the prosecution to establish the source from which it was likely that the respondent derived his allegedly unreported income during the prosecution period beginning in 1946.

One conversation according to the testimony of the investigating agents, occurred in the presence of the defendant. On November 27, 1941, respondent's counsel arranged for the opening by the respondent of a safe deposit box which he had maintained in a bank in Westerly, Rhode Island, so that the agents might examine its contents. It was the only time the agents had any conversation with the respondent (R. 553). While Hurst was dictating an inventory of the papers in the box to Agent Calatrello, who was the Revenue Agent assigned to the investigation, Hurst turned to the respondent and asked him where all the money came from with reference to his net worth; the respondent answered from a number of different people at different times many years ago, whereupon respondent's

counsel interrupted and stated that the respondent got the funds during prohibition days from letting liquor trucks roll through Worcester; the respondent then picked up the conversation and said he got the funds in the nature of a gift and didn't think they were taxable (R. 436-7, 600).

On three other occasions in the absence of the respondent, according to prosecution witnesses, respondent's counsel told them that the money spent by the respondent from 1946 to 1950 came from graft taken by him during prohibition days and while he was on the vice squad between 1933 and 1943. The occasions were as follows: (a) On an unspecified date in November or December, 1951, to Hurst in his office (R. 486); (b) on January 24, 1952, to Hurst in his office (R. 461, 471); and (c) on May 20, 1952, to Hurst and Attorney Isber of the Treasury's District Counsel's office in Mr. Isber's office at a conference at which respondent's counsel was endeavoring to persuade Attorney Isber to recommend against criminal prosecution of the respondent (R. 484-487, 579-581).

The respondent objected to the admissibility of these statements of the attorney on several grounds: (a) The attorney's statements were not made as statements of fact but hypothetically in the course of arguing the innocence of his client; (b) that the respondent never authorized the attorney to make the statements in question; (c) that their admission in evidence would violate the attorney-client privilege which the respondent had never waived; (d) that they were outside the scope of the bill of particulars filed by the Government; (e) that they were irrelevant; (f) that they were immaterial, inflammatory and highly prejudicial to the respondent. At the conclusion of the evidence, upon moving to strike the testimony, the respondent advanced the additional ground (g) that the statements were wholly uncorroborated by other evidence.

The Court held voir dire hearings on the admissibility of the testimony to be given by the witnesses Hurst and Isber (R. 306-405), after a preliminary discussion with counsel as to the advisability of such hearings, (R. page 293, line 28). The evidence at the voir dires consisted of the Treasury regulations governing powers of attorney and testimony as to respondent's counsel's conduct and statements. There was no evidence of the contents of any power of attorney filed by respondent's counsel and no showing that the Treasury regulations had been complied with. There was no evidence regarding the respondent's acts or statements, with the following exception: (a) The episode in the safe deposit vault in the Rhode Island bank, at to which Hurst testified, "I believe I asked him, (the respondent), in substance, where all the money came from with reference to his net worth, and he answered from a number of different people at different times, and respondent's counsel cut in and that was the end of that" (R. 330); (b) the respondent signed "consent waivers" extending the statute of limitations on the assessment of any civil liability for 1948 after the appropriate forms had been submitted to respondent's counsel for transmittal to his client (R. 336-338); (c) in November, 1951, the respondent, as a result of arrangements made by respondent's counsel, deposited $84,000 in escrow in the Treasury suspense account (R. 355-358).

Ultimately, the question of the admissibility in evidence of respondent's counsel's statements, including the issue of the scope of his authority, was left to the jury in the Court's charge (R. 732). The judge first ruled that the question of respondent's counsel's authority was one of law which he would decide (R. 295-297), but he changed his mind over night (R. 467-8). After the voir dire on Hurst's testimony, he made a ruling to which he referred

frequently during the balance of the trial, stating that the question of authority would ultimately be for the jury (R. 370). The Court affirmed this ruling (R. 373) when the purpose of proceeding with a voir dire in connection with Isber's prospective testimony became doubtful to counsel (R. 373, 377) and in several statements to the jury during the testimony (R. 432, 464, 487, 551).

On the issue of admissibility of the attorney's statements, the jury was given much evidence irrelevant to the substantive issues. For examples, (a) several paragraphs of Prentice-Hall Tax Service dealing with the enrollment of attorneys and powers of attorney (R. 424-427); (b) that respondent's counsel told Hurst that he would bring the respondent to Hurst's office for a sworn statement (R. 432-3); (c) that respondent's counsel told Hurst that the respondent probably would be willing to pay the tax deficiencies found by the Revenue Agent (R. 471); (d) that respondent's counsel submitted a list of the respondent's real estate holdings which omitted a parcel allegedly owned by the respondent and told Hurst that he knew nothing about the parcel (R. 450, 453, 476).

Conversely, with regard to the respondent's position (R. 488, 489) that his attorney's admissions were rhetorical and not factual, the Court ruled that it would pass upon the nature of the statements (R. 367) and excluded much testimony tending to support the respondent's position. The Court "made it clear that I wasn't going to allow contentions and arguments to go in" (R. 468) and stated, "If I find something that is argument, I am going to exclude it" (R. 469). On its own motion, and over defense counsel's objection, the Court excluded testimony which would have shown the context in which the attorney's alleged admissions were made (R. 466-470). On its own motion, the Court screened Hurst's testimony and ex-

cluded evidence of respondent's counsel's having discussed hypotheses with Isber (R. 492). When defense counsel, cross-examining Hurst on the important fact that Hurst's extensive diary entries made no mention of respondent's counsel's alleged admissions as to graft and bribe taking, asked whether or not the omissions were due to Hurst's considering respondent's counsel's statements "just lawyer's talk and contentions", the Court excluded the question and stated, "I don't want that question asked again in any form" (R. 563-4).

THE ATTORNEY'S TESTIMONY

Respondent's counsel testified that all statements made by him to Treasury representatives as to his client's taking graft in prohibition days and while on the vice squad were hypothetical, made in the course of arguing that, under various decisions, the prosecution would have the burden of excluding all hypotheses consistent with his client's innocence (R. 623-631, 635-6). During cross-examination by the Court (R. 666-671), respondent's counsel testified that his position apparently had been misunderstood by Attorney Isber. He testified that he never had any conversation with the respondent relative to his activities as a police officer during prohibition days or while on the vice squad (R. 632). The Court excluded his offered testimony that he had no personal knowledge of the respondent's activities during prohibition days or while on the vice squad (R. 632). Respondent's counsel denied that either he or the respondent had made the statements attributed to them by the agents on the only occasion when the agents were in the respondent's presence, at the safe deposit vault of the Rhode Island bank (R. 637-640).

THE CHARGE TO THE JURY

In instructing the jury on the law of agency (R. 732-734), the Court stated that the attorney's authorization by the respondent to make the statements at issue could be implied from circumstances and implications. It charged that the jury could predicate the conclusion that there was an authorization merely on the testimony pertaining to the episode at the safe deposit vault of the Rhode Island bank. It charged that on the question of respondent's counsel's authority, the jury should consider Hurst's method of approach and investigations and Hurst's talks with respondent's counsel.

In instructing the jury on the net worth method of proving tax evasion, the Court said, (R. 738):

> "This is the position which the Government maintains as the basis for its prosecution. It is predicated upon the proposition that if a man accumulates or spends more in a taxable year than his reported income, and if it is established that he (1095) did not get these funds by loans, inheritance, gifts, savings or the sale of some property which he owned, it would seem that he must have received income."

He further said, (R. 744):

> "but if you do not believe these assertions by the defendant through his attorney as to source, then I must charge you that as to the years 1949 and 1950 you may infer that the monies reflected by the net worth evidence came from a taxable source."

The respondent duly excepted to this charge (R. 750) and in the colloquy which followed the judge reiterated his understanding of the law and restated what he had intended to convey to the jury.

In instructing the jury on the requirement of proving a likely source, the Court said (R. 743-744):

> "The only direct evidence of source, except for the statement made by Mr. Garrity to the Internal Revenue Agent was that the defendant received a large sum of cash from his father or his father's estate."

He went on to say, (R. 744):

> "Now I want to say just one other thing to you. If you find that the story about sums of money, X dollars, coming, allegedly coming from the estate of his father,—if you find that statement was so, that it was made and that it was false, then I am going to charge you, and this would have reference to only one period after the father had died,—I am going to charge you that the Government is under no obligation to show a likely source if you find there has been a wilful fabrication."

He further stated, (R. 755):

> "Now if you find that the defendant wilfully fabricated through Mr. Garrity an account of the receipt of non-taxable income from the father's estate, and that the defendant (1119) intended to convey to the representatives of the Bureau of Internal Revenue that the re-

ceipt of non-taxable income from that source materially contributed to his increase in net worth during any of the years named in the indictment, you may then infer that the defendant was concealing the receipt of current taxable income."

In instructing the jury on the relevancy of the testimony concerned with alleged acceptance of graft by the respondent prior to 1943, the Court charged, (R. 734):

"Now, I say this advisedly: the source which the Government alleges—and if I am wrong I desire to be corrected—is illegal payments by persons unknown to induce this defendant Massei to perform acts of misfeasance, malfeasance and nonfeasance, to do something that was improper, (1090) that was wrong, and that with particular application to the position which he held, a position of a fiduciary nature, a position of a police officer, a member of the police force of the City of Worcester. There is a presumption, and I am going to instruct you on this, there is a presumption that a police officer does not receive illegal payments. That is a very, very efficacious presumption, and it would apply to other men holding offices of trust and confidence, but if you find that that presumption had been rebutted, and rebutted by the test that I have given you, has been rebutted, for example, by the admissions made by the defendant, so far as the presumption applies to him, then I charge you that you may infer, having in mind his continued position in the police department, you may infer that continued payments of this sort were a likely source of the increases in net worth reflected by the Government's evidence, if you find that they showed it."

He further charged (R. 749):

> "It's the Government's contention that if you believe—if I am incorrect, I want the United States Attorney to correct me—it is the Government's contention that if you believe that these sources of monies came to (1110) him in sums which represented payments in the manner that was testified to by witnesses, having in mind his salary at the time, that a likely source of income he got as a police officer, that that likely source of income continued while he was in the Police Department down to 1950, or whatever time he retired. Isn't that your position?"

On the question of corroboration the judge charged (R. 743):

> "If you believe that admissions were made by the defendant's attorney with authority to make admissions, you must find the admissions were corroborated before you weigh the admissions against the defendant. What is corroboration? Simply this. Some independent evidence which tends to strengthen the admissions, something which tends to bear them out, something which causes your belief in the admissions to become stronger."

CONCLUSION OF THE TRIAL

The respondent moved for acquittal (R. 779) on each indictment at the close of the Government's case (R. 607), at which time the Court declined to rule on the motion, and renewed the motion at the close of all the evidence (R. 679). A hearing was held on the motion (R. 679-700) and it was denied (R. 700). The respondent filed requests for instruc-

tions (R. 3, 779-786). After the charge the respondent entered numerous objections (R. 745-756), which were overruled.

The jury retired and returned with a verdict of guilty on each count (R. 757-758). The respondent was sentenced to two years' imprisonment and a fine of $5,000.00 (R. 4).

Summary of Argument

This is a net worth case, and to sustain its burden the Government must prove the following:

1. Attempt to evade;
2. Attempt was willful;
3. Additional tax owing;
4. Establish a starting point with reasonable certainty;
5. Introduce evidence of a likely source to account for the increases in net worth.

This case resolves itself into the question of whether the Government satisfied its burden of proving the essential element of a likely source.

The Government in its brief argues that it satisfied its burden of proof in this particular by three lines of proof:

1. Evidence of an increase in net worth plus negation of sources of nontaxable receipts.

This line of proof respondent submits is clearly not sufficient under the decision of *Holland* v. *U. S.*, 348 U.S. 121. Indeed, from reading the Government brief it seems clear that the Government itself believes that this evidence is only sufficient when coupled with other evidence.

2. Evidence of a calculated fabrication so as to bring it within the decision of *U. S.* v. *Adonis*, 221 F.2d 717.

Respondent submits that the Adonis decision is not good law, but even if this Court should decide that a "calculated fabrication" can be a substitute for the affirmative proof of a likely source, there is no evidence in this case of such a "calculated fabrication".

3. Alleged admissions by respondent and respondent's counsel of accepting graft in pre-indictment years from which the Government asks that an inference be drawn that graft was received in the indictment years.

This line of proof resolves itself into a question of the admissibility of evidence. The Government asks that admissions of the respondent and his attorney as to graft taking by respondent in pre-indictment years be admitted to prove that respondent took graft in the years under indictment. Indeed there was not one iota of evidence introduced as to any graft taking in the indictment years or even opportunity for taking graft other than the fact that the respondent remained in the police department. Respondent objected to the admissibility of these alleged admissions on the following grounds:

(1) Irrelevancy and immateriality;
(2) Lack of corroboration;
(3) Incompetency as being in violation of the attorney-client privilege and as being beyond the scope of the attorney's authority.

The Court below in its opinion held that the alleged admissions should have been excluded as being irrelevant and also as being uncorroborated. As a result, the Court below never reached the question as to whether this evidence could be a substitute for the "likely source" as demanded by the *Holland* case. As the Court below said at page 905:

"While we have mentioned the *Adonis* case, above, and the Second Circuit *Ford* case, earlier in this opinion, we do not mean to infer that we either approve or disapprove of the exceptions to the necessity of proving likely source that these holdings seem to have established."

In short, without the evidence of the alleged admissions in the case, the Government has completely failed in its burden of proof. Even if this evidence were admitted, respondent submits that the Government has failed to satisfy its burden of proof under the doctrine of the *Holland* case and its Bill of Particulars wherein the Government indicated it was going to introduce affirmative evidence of graft taking in the indictment years.

Argument

I. Evidence Proving No Nontaxable Receipts Does Not Support the Inference that the Increases in Net Worth Must Be Attributable to Unreported Taxable Income.

The Government investigation showed the respondent received no nontaxable receipts. From this proof of a negative character the Government argues that the 'bulge' must be taxable income. In *Holland* v. *U. S.*, 348 U.S. 121, the Government was required to reasonably negate other nontaxable sources of income in addition to showing a likely source to account for the increases in net worth. L. Hand, J. in *U. S.* v. *Costello*, 221 F.2d 668, 670, 671 discusses the *Holland* case and the burden on the Government as follows:

"However, this is not enough, for it does not follow that all that the taxpayer expended was necessarily

> taxable income, or indeed income of any kind. Conceding something for the difficulty of establishing by impregnable proof how much was income, the Court is satisfied with 'proof of a likely source, from which the jury could reasonably find that the net worth increases sprang'. True, a 'likely source' may not be the true source, so that it is necessary in addition to exclude the possibility that what he received did not come from gifts, inheritances or loans. Here too the Court does not exact precision, for, 'where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant.' "

Hence, it was error for the trial court to charge the jury that an increase in net worth plus negation of sources of nontaxable income is sufficient basis for the jury to find that increase alleged is income (R. 738; Respondent's objection, R. 750). (The trial court's thinking in the matter is clearly set out in the colloquy in R. 692-694.)

It is interesting to note that the Government investigation in no way negated the possession of cash by the respondent at the beginning of the period. Indeed, the Government tries to prove source through the alleged admissions of respondent's counsel. These admissions if anything prove substantial cash in the respondent's possession prior to the period. This proof of a negative character actually goes to destroy the certainty of the fixed starting point. If these admissions prove anything, they prove cash in the possession of the respondent while on the vice squad. Yet the Government allows him no cash at the start of the period.

II. There Was No Evidence of a Deliberate Fabrication Indicating a Consciousness of Guilt.

The Court also charged that there was evidence of deliberate fabrication by respondent. The Court stated that there was an alleged admission that respondent "received a large sum of cash from his father or his father's estate . . . but if the jury did not believe this assertion it could infer as to the years 1948 and 1949 that the monies reflected by the net worth evidence came from a taxable source". (R. 74[illegible] Respondent's objection, R. 749, 754 and 755)

It should first be noted that the Court was incorrect as to the evidence on this point. First, the evidence applies only to the year 1949, whereas the Court charged that the jury could infer source from this evidence for both the years 1948 and 1949. Secondly, there was never any evidence in the record as to the amount allegedly received by the appellant. One Government witness testified (R. 581) that the phrase "X dollars" was used. Another Government witness stated that no figure was mentioned (R. 491). Clearly, on this state of the evidence, even if the *Adonis* theory applied, the alleged fabrication was immaterial.

The Court was obviously charging the jury as to how to find source on the theory of *Adonis* v. *United States*, 221 F.2d 717. The facts in that case are clearly distinguishable. Adonis had been indicted for tax evasion for the year 1948. The Government proceeded on the net worth theory. In 1951, Adonis testified in a judicial proceeding in Holland and was questioned as to the increase in his net worth in the year 1948. In this judicial proceeding, Adonis offered five different sources which together made up the total increase in net worth. At the tax evasion trial, the Government offered in evidence Adonis' testimony in the Holland judicial proceeding and then proceeded to prove

that his explanations as to source were fabrications. The Court of Appeals ruled that this calculated fabrication was sufficient evidence from which the jury could infer that the source of his increase in net worth was taxable income.

Respondent respectfully submits that a casual statement of respondent's counsel, if admissible at all, certainly did not constitute a "calculated fabrication" such as was made in the *Adonis* case. As the Court below said in its opinion at page 905, "Since we do not believe this was a 'calculated misrepresentation' within the meaning of the *Adonis* case, we believe that case is inapplicable".

III. The Court Below Was Correct in Holding that the Trial Judge Should Have Excluded Extra-Judicial Admissions by Respondent that He Took Graft In Pre-Indictment Years as Irrelevant and Immaterial.

The Court below correctly held that the testimony as to respondent's activities from 1923 to 1943 should have been excluded as irrelevant and immaterial. The respondent himself allegedly admitted grafting on the occasion of his opening a safe deposit box in the Westerly, Rhode Island bank. According to Agent Calatrello, whose version of the episode was more complete than Hurst's, the special agent asked the respondent the source of the funds that were used to acquire the various assets; the respondent replied that the funds came from many different people; respondent's attorney interrupted, saying the respondent got them during prohibition days when he let liquor trucks roll through Worcester; the respondent added that the payments were gifts which he believed were not taxable (R. 600). On three other occasions respondent's attorney allegedly made similar statements and added that the

respondent received graft while on the vice squad between 1933 and 1943.

This was the sole evidence supporting the particulars filed by the Government that "the likely source of unreported income of the defendant is moneys received by the defendant from many persons engaged in various illegal activities for * * * services rendered to such persons in connection with such illegal activities." In other words, the prosecution asked the Court and jury to infer that the respondent accepted in 1946, for example (Exhibit 44, R. 775), bribes amounting to $26,426.11 on the basis of his having claimed that this money represented graft taken in prohibition days and before 1943, when he was transferred from the vice squad. The prosecution sought to prove that the respondent took bribes at the rate of $500 per week during 1946 by evidence that "during the prohibition years" he received unspecified illegal payments from "every truck loaded with liquor that passed through the main street of Worcester" (R. 486). It is noted here that, unlike the usual net worth tax evasion defendant, the respondent was a salaried employee and had no income-producing business.

In *Railton* v. *United States*, 127 F.2d 691, the respondent was a city official and was convicted of conspiracy to steal Government property. The chief prosecution witness, who had been indicted as a co-conspirator, was permitted to testify that on several instances previous to the crime involved in the trial, he and the respondent had stolen property belonging to the city. The Court of Appeals reversed the conviction, stating at p. 693:

> "* * * It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright

> one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged. * * * *

In the case at bar the only basis for the admission of evidence as to the respondent's conduct in prohibition days was to show that he was disposed to be dishonest. The words of Judge Parker in *Lovely* v. *United States*, 169 F.2d 386, seem precisely in point:

> "The rule which thus forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except in so far as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. If such evidence were allowed, not only would the time of courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial."

The respondent was charged with tax evasion for 1942 and 1943 in *Sang Soon Sur* v. *United States*, 167 F.2d 431. It does not appear in the opinion whether or not the prosecution used the net worth method. In making a statement to an investigating agent of the Treasury, the respondent admitted that he had been charged with possessing opium in 1936 and was convicted of having some opium in 1934. The trial judge denied the respondent's motion to strike those admissions from the agent's testimony. The Court of Appeals reversed the convicting, stating at p. 432, "We fail to perceive any relevancy between an evasion of the

payment of income taxes and a conviction for the possession of opium."

In *United States* v. *Adonis*, 221 F. 2d 717, the respondent was charged with tax evasion for 1948. The Government offered testimony that the respondent had admitted that in 1950 he was a "go-between for the pinball operators and the government." The Court of Appeals stated at pp. 720-721:

> "* * * If this evidence had been connected with the year 1948 it would have supplied a significant indication of a likely source of unreported 1948 income. But we think that this unamplified statement of what the appellant was doing in 1950 is too far removed in time from the taxable year to provide any substantial support for an inference that he received income from that source in 1948. * * *"

It is submitted that as to proof of a likely source of allegedly unreported income, there is no logical distinction between an inference based on conduct two years after the year for which the defendant was indicted and conduct two years before.

The law does not permit any inference that because a man has sinned once he will sin again. *Railton* v. *United States*, 127 F.2d 691, 693 (C.C.A. 5). During the indictment years the respondent's duties with the Worcester Police Department were entirely different from his duties during the prohibition era when, it is alleged, he admittedly took bribes from bootleggers. From 1943 to 1947, and again from 1949 to 1951, he was personnel officer with the duty of inspecting the physical plant and personnel and seeing that patrolmen carried out their assignments. From 1947 to 1949 he was License Board investigator, charged with investigating license applications for taxicabs, gas stations and parking lots. There was no

evidence of what opportunities he had to receive graft during this period. Unless we adopt the reasoning of the dissenting opinion in the Court of Appeals and take judicial notice that a police officer in any assignment has an opportunity to receive graft, there is no showing that the respondent's duties and responsibilities during the indictment years were such that it would be worth anyone's while to bribe him. The Government's position on this evidence, in other words, is that the fact that a police officer received bribes at one stage of his career proves that he took bribes during his entire time on the Police Department no matter what his rank, his assignment or whom he was dealing with. No conviction in a criminal case should be allowed to rest on such evidence.

IV. The Court Below Was Correct in Holding That the Alleged Admissions of Respondent and His Attorney Were Uncorroborated.

The alleged admissions of the respondent and his attorney were the only evidence offered by the prosecution as to the likely source of the respondent's alleged unreported income, which source the prosecution contended was services rendered to persons engaged in illegal activities. Unless those admissions were corroborated, they should have been stricken from evidence and withdrawn from consideration by the jury. *Smith* v. *U. S.*, 348 U.S. 147; *U. S.* v. *Calderon*, 348 U.S. 160; *Opper* v. *U. S.*, 348 U.S. 84. In the *Smith* case, Mr. Justice Clark stated:

> "An admission which assumes this importance in the presentation of the prosecution's case should not go uncorroborated, and this is true whether we consider the statement an admission of one of the formal 'elements' of the crime or of a fact subsidiary to the

> proof of these 'elements.' It is the practical relation of the statement to the Government's case which is crucial, not its theoretical relation to the definition of the offense."

There was not an iota of corroboration in the evidence of the respondent's having taken bribes during prohibition days or while on the vice squad. Nor was there any corroboration of the respondent's alleged implied admission that he took bribes during the prosecution period from 1946 to 1950. Nevertheless, the prosecuting attorney, in argument to the Court, referred to the respondent as "a defendant with 25 years of experience in taking graft" (R. 362)!

The character or intent of the respondent were not put in issue by the evidence of whether the respondent took bribes. The only issue was the *fact* of whether he took them or not. The question of relevancy and corroboration become closely connected in this respect.

> "When the very doing of the act charged is still to be proved, *one* of the evidential facts receivable is the person's Design or Plan to do it (ante Sec. 102). This in time may be evidenced by conduct of sundry sorts (ante Sec. 234) as well as by direct assertions of the design (post Sec. 1725). But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than mere similarity, which suffices for evidencing intent (ante Sec. 302)." (Emphasis added) Wigmore on Evidence, 3rd Ed. 1940, Sec. 304.

It is submitted that the "something more" spoken of by Wigmore is independent corroborative evidence. The

similar act is only one of the evidential facts receivable; it must be supported by the offer of others. None were offered because none existed.

V. The Trial Court Erred in Failing to Exclude the Alleged Admissions By Respondent's Counsel That Respondent Had Taken Graft in the Pre-Indictment Years On the Grounds That it Violated the Attorney-Client Privilege and That Counsel Was Not Authorized to Make Extra-Judicial Admissions in Aid of A Criminal Prosecution of His Client.

These reasons for the exclusion of the alleged admissions by respondent's counsel were properly argued both at the trial and in the Court of Appeals. The Court below, however, did not touch on these questions in its opinion. Nonetheless, respondent respectfully urges that these additional reasons for exclusion should be considered at this time. Respondent submits that with the alleged admissions excluded, the Government has no case. Respondent feels that the reasons for exclusion discussed in this section of the brief are just as valid as the reasons of relevance and lack of corroboration as adopted by the Court below. If this Court finds any one of these three reasons valid, there will be no need to go farther. Hence, respondent feels that these additional reasons for exclusion should be considered by this Court at this time.

There is a two-fold question involved here. One concerns the violation of an attorney-client privilege in the disclosure to Treasury agents of facts revealed to an attorney. (There can be no doubt that any information respondent's counsel had of Massei's activities was acquired from Massei and not of his own knowledge). The second question involves the authority of an attorney to make extra-judicial admissions in aid of a criminal prosecution of his client.

Does the engagement by a taxpayer of an attorney to represent him in a criminal proceeding or to prevent a criminal prosecution authorize the attorney to supply the necessary evidence required to complete the government's case in the form of admissions of certain conduct on the part of his client?

Stated in this manner the answer seems obvious. No man facing a criminal action hires an attorney to invest him with authority to supply the missing pieces of the government's case. Should the District Court judge's ruling in the instant case be upheld, no attorney would ever dare to confer with Internal Revenue Agents concerning his client's civil liability or criminal liability. Extended further, attorneys would hesitate to offer a plea of guilty to a lesser crime or a compromise of a civil suit. Such would go against a policy of the law which favors the settlement of controversies without litigation. See 4 Wigmore on Evidence s. 1061. An attorney is not a person whose admissions may be used against the party client, except so far as they concern the management of the litigation. 4 Wigmore on Evidence s. 1063. Lord Mansfield stated the proposition as follows: "I am not aware that any conversation of an attorney, not spoken upon oath, nor proved to be authorized by his client, can bind the client." *Wilson* v. *Turner*, (1808) 1 Taunt. 398, 127 Eng. Repr. 888. The admissions in the case at bar, made during an attempt by the attorney to prevent a trial, obviously were not made by him for dispensing with proof of these facts at the trial. "It was a conversation relating to a fact in controversy, but not an agreement relating to the management and trial of a suit, or an admission intended to influence the procedure in the pending action, or in any other . . . ." *Pickert* v. *Hair*, 146 Mass. 1, 5. *Saunders* v. *McCarthy*, 8 Allen 42, 45. *Procter* v. *Old Colony Railroad* 154 Mass. 251. *Hicks* v. *Naomi Falls Mfg. Co.*, 138 N. C.

319, 50 S.E. 703. *Horseshoe Mining Co.* v. *Miners' Ore Sampling Co.*, 147 Fed. 517 (C.C.A. 8). *Humble Oil & Refining Co.* v. *Sun Oil Co.*, 191 F. (2d) 705 (C.A. 5)

Of course, there are exceptions to the rule making privileged a communication by the client to the attorney. One of these is the situation where the client has obviously communicated information to the attorney with intent that he communicate it to other persons. *Loomis* v. *New York, New Haven & Hartford Railroad*, 159 Mass. 39, 44. *United States* v. *Shibby*, 112 F. Supp. 734 (D.C., S.D., Calif.) Once the client discloses the privileged matter (or his version of it) he waives the privilege. *Stein* v. *First National Bank of Sarcoxie, Mo.*, 298 Fed. 36 (C.C.A. 8). *Hunt* v. *Blackburn*, 128 U.S. 464. A statement made by a client to an attorney in an attempt to get help in the commission of a crime is not privileged. *Standard Fire Insurance Co.* v. *Smithhart*, 183 Ky. 679. The privilege, of course, has no application where the parties involved in the communication do not stand in the relationship of attorney and client. *Steiner* v. *United States*, 134 F. (2d) 931 (C.C.A. 5), (attorney spoke to another attorney in the latter's capacity of member of the Board of Governors of state bar association). *Himmelfarb* v. *United States*, 175 F. (2d) 924 (C.A. 9) (statements made to an accountant hired by the defendant's attorney were not privileged and admissible through the accountant). *Wild* v. *Paysen*, 7 F.R.D. 495 (D.C., S.D., N.Y.)

Where an attorney attempting to negotiate with the Treasury on behalf of his client, submitted his client's answers to questions asked by the Treasury, there was no violation of the privilege in calling him to the stand at the client's trial to identify the papers containing the questions asked by the Treasury and the answers given by his client. *Banks* v. *United States*, 204 F. (2d) 666 (C.A. 8).

The government's position here is that the attorney was

the defendant's agent and thus authorized to make admissions on his behalf. Of course, if the attorney was in fact Massei's agent, any statement made by him within the scope of his agency was a statement made by Massei. *Dastagir* v. *Dastagir*, 241 P. (2d) 656. *American Fur Co.* v. *United States*, 2 Pet. 358, 364. The government, having claimed the existence of an agency had the burden of proving it. *Beard* v. *United States*, 59 F. (2d) 940 (C.C.A. 8). "Since the burden is primarily upon the party asserting the existence of the agency to not only prove its existence, but also the nature and scope of the agent's authority * * * * * it is necessary to an assumption of authority to commit a particular act that such act be first shown to be within the general class of acts which constitute the agent's duties." *Gosney* v. *Metropolitan Life Insurance Co.*, 114 F. (2d) 649 (C.C.A. 8). Such authority cannot be proved by the hearsay statements of the agent himself. *Brownell* v. *Tide Water Associated Oil Co.*, 121 F. (2d) 239, (C.C.A. 1). There is nowhere in this record any evidence of the contents of the power of attorney filed in this case (if in fact one was filed). There is nothing, in other words, to show that the position of the attorney was anything but that of attorney. There is no showing that the defendant authorized revelation of any information he gave his attorney, and where a person, as a client or prospective client, consults a member of the bar in his capacity as such, the communications in confidence of matters which are or which the client reasonably supposed to be necessary to the proper conduct of legal business, not unlawful, is privileged at the option of the client. *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357 (D.C., Mass.). If any evidence was obtained as the result of the violation of the attorney-client privilege, it was obtained illegally and hence was not admissible. *Weeks* v. *United States*, 232 U. S. 383. *Gould* v. *United States*, 255 U. S. 298.

Inasmuch as there was no evidence of the extent of Garrity's authority as an agent, and, since no authority to make admissions binding on his client may be assumed from his position as an attorney, it was error to allow this evidence to go to the jury.

VI. The Court Below Was Correct in Holding that Proof of a Likely Source of Unreported Income Is an Indispensable Element of a Net Worth Case.

A. The Decision of the Court Below Does Not Conflict with the *Adonis* Case or *U. S.* v. *Ford*, 237 F.2d 57.

It is respondent's position that this Court, as was the case with the Court below, will never reach the question of source since the only evidence offered by the Government as to source was inadmissible. The holding of the Court below that proof of a likely source of unreported income is "an indispensable element" of a net worth prosecution was unnecessary to the decision. It is the Government's position that there must be evidence to support the inference that the net worth increases are attributable to currently taxable income rather than to nontaxable receipts. But, striking out the alleged admissions by respondent and respondent's counsel, there is no evidence at all in the case to support the desired inference.

B. The Respondent Respectfully Submits That the Following Is a Correct Statement of the Law Applicable to This Case.

In a 26 USC 145(b) prosecution, the Government must prove the existence of three elements: (1) an attempt to evade and defeat; (2) willfulness; (3) an additional tax

owing. This case is a net worth case. Attention is focused on the differences between the taxpayer's assets and liabilities as of the beginning and as of the end of a given prosecution year. The increase in net worth is presumed to be net income if the Government satisfies two additional conditions:

(1) That there is evidence of a likely source to account for the increases in net worth;

(2) That the Government has established with reasonable certainty a fixed starting point.

Source may be proved in one of two ways:

(a) By showing that the taxpayer is in an income-producing business from which the income could have been derived. *Holland* v. *U. S.*, 348 U.S. 121 (hotel business proved to be capable of producing much more income than was reported); *U. S.* v. *Johnson*, 319 U.S. 503 (concealed ownership by taxpayer of gambling houses).

(b) By evidence of specific items of unreported income. In *U. S.* v. *Chapman*, 168 F.2d 997, the Government showed a possible source of income by testimony that during the prosecution period seven meat pedlers paid overceiling prices for purchases from the defendant's company, paying the excess in currency either to Chapman direct or to his salesmen. In *U. S.* v. *Skidmore*, 123 F.2d 604, there was evidence that bookmakers paid monthly sums to the defendant in currency for "protection".

As to this proof of source, there must be some independent showing that the source alleged might be the

source of the unreported income. *Holland* v. *U. S.*, 348 U.S. 121; *Thomas* v. *Commissioner*, 232 F.2d 520.

In addition to this independent showing of likely source, the Government must reasonably negate other nontaxable sources of income.

All of the above propositions were called to the attention of the Court in requests for instructions duly filed by the appellant (R. 779-786).

It should be noted that the appellant's motion for a bill of particulars asked that the Government specify the source of his alleged income for each of the years in question (R. 12). The Government in its answer specified that the source was illegal payments to appellant as a police officer by many persons engaged in various illegal activities (R. 13). It is clear on this answer that the Government must make an independent showing of such illegal payments to appellant during the indictment years.

C. The *Adonis* Decision and the *Ford* Decision Are In Conflict with the *Holland* Case and Basic Constitutional Law.

The *Adonis* case and the *Ford* case are exceptions carved out of the *Holland* rule requiring the Government to prove a likely source in a net worth case. As stated by Frank, J. in his dissenting opinion in the *Ford* case at page 72:

> ". . . I question whether *Holland* v. *U. S.*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, ever permits a conviction in a net worth case without proof of a 'likely source', which (to quote Judge Hincks) 'the defendant had actually drawn upon.' "

As Judge Frank points out at page 70:

> "*Holland* v. *United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150, and its companion decisions warn us that the net worth method is a dangerous instrument, to be used with caution, lest it may have the effect of unconstitutionally putting on an accused the burden of proving his innocence."

Shifting the burden of proof is exactly what Woodbury, J. does in his dissenting opinion in the Court below. His dissent stands for the proposition that because a man is a police officer, the Government need only show an increase in net worth plus negation of nontaxable sources. As he says:

> "It seems to me that proof of position on a municipal police force, where everyone knows opportunities for graft exist, is as much proof of a likely source of unreported income as is proof of ownership of a business capable of producing income."

In view of all the cautions and safeguards set out by this Court in the *Holland* decision, respondent respectfully submits that the dissent in the Court below is clearly wrong. Even more basic error, however, is that Judge Woodbury's dissent and to a lesser extent the decisions in the *Ford* and *Adonis* cases put the burden on a defendant to prove his innocence.

Conclusion

Respondent respectfully submits that the judgment below should be affirmed.*

Respectfully submitted,

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* The Court below did not pass on several issues raised by the respondent. For the Court's information, these issues are as follows:

1. The Court erred in refusing to allow appellant to be heard and offer evidence in support of his motions to dismiss the indictment because of improper presentation of improper evidence to the grand jury and to inspect the grand jury minutes.
2. The appellant was denied a speedy trial.
3. The Court should have decided the question as to the attorney's authority and erred in submitting it to the jury.
4. The Court erroneously excluded testimony offered by the appellant to prove that his attorney's alleged admissions were rhetorical and not factual.
5. The Court's charge to the jury misstated the law as to the net worth method of proving tax evasion and the admissibility of the attorney's alleged admissions.
6. The Court allowed two blackboards containing the Government computations to go to the jury room without adequate instructions.
7. The Court permitted the Government to introduce evidence beyond the scope of its Bill of Particulars and refused to allow respondent any time to prepare to meet the new theory of the Government's case.